

## NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK ROBERT QUIROZ,

Plaintiff,

vs.

ROBERT A. HOREL, et. al.,

Defendants.

No. C 05-2938 JF (PR)

ORDER OF SERVICE; ORDER  
DIRECTING DEFENDANTS TO  
FILE DISPOSITIVE MOTION  
OR NOTICE REGARDING  
SUCH MOTION

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff has paid the filing fee. Plaintiff has filed an amended complaint and a second amended complaint. The Court will order service of the second amended complaint on the named Defendants.

**DISCUSSION****A. Standard of Review**

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. §

1 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v.  
2 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

3 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
4 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that  
5 the alleged violation was committed by a person acting under the color of state law. See West v.  
6 Atkins, 487 U.S. 42, 48 (1988).

7 **B. Plaintiff's Claims**

8 Plaintiff alleges that prison officials failed to provide adequate medical care for his liver  
9 condition and failed to notify him of his Hepatitis C condition. The Court finds that Plaintiff's  
10 allegations, liberally construed, state a cognizable claim that Defendants Winslow, Astoria,  
11 Milliman, and Horel violated his Eighth Amendment rights by acting with deliberate  
12 indifference to his serious medical needs.

13 Plaintiff alleges that Defendants Hernandez and Marquez deprived him of his personal  
14 property, an address book, because it allegedly contained names of gang members. Plaintiff  
15 claims that he was not given a hearing or notified of any rules violation for possession of this  
16 property and that the property was never returned to him. The Court concludes that Plaintiff has  
17 alleged a cognizable procedural due process claim under the Fourteenth Amendment that  
18 Defendants Marquez, Hernandez, and Horel deprived him of his personal property pursuant to an  
19 authorized state procedure, but without any hearing.

20 Plaintiff also has alleged a state tort claim of negligence, a due process claim and an  
21 equal protection claim pursuant to the California Constitution. The federal supplemental  
22 jurisdiction statute provides that ““district courts shall have supplemental jurisdiction over all  
23 other claims that are so related to claims in the action within such original jurisdiction that they  
24 form part of the same case or controversy under Article III of the United States Constitution.””  
25 28 U.S.C. § 1367(a). Liberally construed, plaintiff's allegations satisfy the statutory  
26 requirement. Accordingly, the Court will exercise supplemental jurisdiction over plaintiff's state  
27 law claims.

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2 **CONCLUSION**

3 For the reasons stated above, the Court orders as follows:

4 1. The Clerk of the Court shall issue summons and the United States Marshal shall  
5 serve, without prepayment of fees, a copy of the second amended complaint in this matter  
6 (docket no. 9), all attachments thereto, and a copy of this order upon: **Robert A. Horel, Pelican**  
7 **Bay State Prison Warden; Dwight Winslow, Chief Medical Officer and Health Care**  
8 **Manager at Pelican Bay State Prison; Dr. Astorga, Staff Physician and Chief Medical**  
9 **Officer at Pelican Bay State Prison; Mr. Milliman, New Folsom State Prison Medical**  
10 **Department; Lieutenant Robert Marquez at Pelican Bay State Prison; and Correctional**  
11 **Officer Hernandez at Pelican Bay State Prison.** The Clerk shall also mail courtesy copies of  
12 the complaint and this order to the California Attorney General's Office.

13 2. No later than **ninety (90) days** from the date of this order, Defendants shall file a  
14 motion for summary judgment or other dispositive motion with respect to the claims in the  
15 second amended complaint as set forth above.

16 a. If Defendants elect to file a motion to dismiss on the grounds that Plaintiff  
17 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
18 Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315  
19 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810 (2003).

20 b. Any motion for summary judgment shall be supported by adequate factual  
21 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil  
22 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**  
23 **qualified immunity found, if material facts are in dispute. If any Defendant is of the**  
24 **opinion that this case cannot be resolved by summary judgment, he shall so inform the**  
25 **Court prior to the date the summary judgment motion is due.**

26 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and  
27 served on Defendants no later than **thirty (30) days** from the date Defendants' motion is filed.

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1           a.       In the event Defendants file an unenumerated motion to dismiss under  
2 Rule 12(b), Plaintiff is hereby cautioned as follows:<sup>1</sup>

3           The Defendants have made a motion to dismiss pursuant to Rule 12(b) of  
4 the Federal Rules of Civil Procedure, on the ground you have not exhausted your  
5 administrative remedies. The motion will, if granted, result in the dismissal of  
6 your case. When a party you are suing makes a motion to dismiss for failure to  
7 exhaust, and that motion is properly supported by declarations (or other sworn  
8 testimony) and/or documents, you may not simply rely on what your complaint  
9 says. Instead, you must set out specific facts in declarations, depositions, answers  
10 to interrogatories, or documents, that contradict the facts shown in the  
11 Defendant's declarations and documents and show that you have in fact exhausted  
12 your claims. If you do not submit your own evidence in opposition, the motion to  
13 dismiss, if appropriate, may be granted and the case dismissed.

14           b.       In the event Defendants file a motion for summary judgment, the  
15 Ninth Circuit has held that the following notice should be given to Plaintiffs:

16           The defendants have made a motion for summary judgment by which  
17 they seek to have your case dismissed. A motion for summary judgment under  
18 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

19           Rule 56 tells you what you must do in order to oppose a motion for  
20 summary judgment. Generally, summary judgment must be granted when there is  
21 no genuine issue of material fact--that is, if there is no real dispute about any fact  
22 that would affect the result of your case, the party who asked for summary  
23 judgment is entitled to judgment as a matter of law, which will end your case.  
24 When a party you are suing makes a motion for summary judgment that is  
25 properly supported by declarations (or other sworn testimony), you cannot simply  
26 rely on what your complaint says. Instead, you must set out specific facts in  
27 declarations, depositions, answers to interrogatories, or authenticated documents,  
28 as provided in Rule 56(e), that contradict the facts shown in the defendants'  
29 declarations and documents and show that there is a genuine issue of material fact  
30 for trial. If you do not submit your own evidence in opposition, summary  
31 judgment, if appropriate, may be entered against you. If summary judgment is  
32 granted in favor of defendants, your case will be dismissed and there will be no  
33 trial.

34       See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read  
35 Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317  
36 (1986) (holding party opposing summary judgment must come forward with evidence showing  
37 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that  
38 failure to file an opposition to Defendants' motion for summary judgment may be deemed to be a

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39       <sup>1</sup>The following notice is adapted from the summary judgment notice to be given to pro se  
40 prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See  
41 Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 consent by Plaintiff to the granting of the motion, and granting of judgment against plaintiff  
2 without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges  
3 v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

4 4. Defendants shall file a reply brief no later than **fifteen (15) days** after Plaintiff's  
5 opposition is filed.

6 5. The motion shall be deemed submitted as of the date the reply brief is due. No  
7 hearing will be held on the motion unless the Court so orders at a later date.

8 6. All communications by the Plaintiff with the Court must be served on Defendants,  
9 or Defendants' counsel once counsel has been designated, by mailing a true copy of the  
10 document to Defendants or Defendants' counsel.

11 7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.  
12 No further Court order is required before the parties may conduct discovery.

13 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
14 informed of any change of address and must comply with the Court's orders in a timely fashion.  
15 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to  
16 Federal Rule of Civil Procedure 41(b).

17 IT IS SO ORDERED.

18 DATED: 11/9/07

  
JEREMY FOGEL  
United States District Judge

1 A copy of this ruling was mailed to the following:

2 Mark Robert Quiroz  
3 C-50887  
4 Pelican Bay State Prison  
5 P.O. Box 7500  
6 Crescent City, CA 95532-7500  
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